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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 JOSEPH C. SISNEROS,
12 CDCR #F-17317,

13 Plaintiff,

14
15 vs.

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17 BROWN, Sergeant;
18 MENDEZ, Correctional Officer;
19 DAVIS, Dr., Psychiatrist;
20 KRITTMAN, Dr., Psychologist,

21 Defendants.

Civil No. 14cv0891 GPC (RBB)

ORDER:

14 **(1) GRANTING PLAINTIFF**
15 **LEAVE TO PROCEED**
16 ***IN FORMA PAUPERIS***
17 **[Doc. No. 2]**

18 **AND**

19 **(2) DIRECTING U.S.**
20 **MARSHAL TO EFFECT**
21 **SERVICE OF COMPLAINT**
22 **PURSUANT TO**
23 **FED.R.CIV.P. 4(c)(3) AND**
24 **28 U.S.C. § 1915(d)**

22 Joseph C. Sisneros ("Plaintiff"), who is currently incarcerated at Richard J.
23 Donovan Correctional Facility ("RJD") in San Diego, California, and proceeding pro se,
24 has filed a civil rights complaint ("Compl.") pursuant to 42 U.S.C. § 1983 (Doc. No. 1).

25 Plaintiff claims several correctional and mental health officials at RJD acted with
26 deliberate indifference to his safety in violation of the Eighth Amendment in September
27 and October 2013 by placing him in a cell with another inmate who "bushwacked" him.
28 See Compl. at 3. Plaintiff alleges he was particularly vulnerable to attack based on his

age and medical condition, and that before the attack, he had objected to the assignment by reporting his cellmate's "bizarre, erratic & crazy behavior." *Id.* at 2-4. Plaintiff alleges he was told he "had no choice," and was "severely beaten" because "nothing was done." *Id.* at 4.

Plaintiff has not prepaid the civil filing fee; instead he has submitted certified copies of his prison trust account statements, which the Court construes as his request to proceed *in forma pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) (Doc. No. 2).

I. MOTION TO PROCEED IFP

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$400. *See* 28 U.S.C. § 1914(a).¹ An action may proceed despite a plaintiff's failure to prepay the entire fee only if he is granted leave to proceed IFP pursuant to 28 U.S.C. § 1915(a). *See Rodriguez v. Cook*, 169 F.3d 1176, 1177 (9th Cir. 1999). However, a prisoner granted leave to proceed IFP remains obligated to pay the entire fee in installments, regardless of whether his action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Under 28 U.S.C. § 1915, as amended by the Prison Litigation Reform Act ("PLRA"), a prisoner seeking leave to proceed IFP must submit a "certified copy of the trust fund account statement (or institutional equivalent) for the prisoner for the six-month period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2); *Andrews v. King*, 398 F.3d 1113, 1119 (9th Cir. 2005). From the certified trust account statement, the Court assesses an initial payment of 20% of (a) the average monthly deposits in the account for the past six months, or (b) the average monthly balance in the account for the past six months, whichever is greater, unless the prisoner has no assets. *See* 28 U.S.C. § 1915(b)(1); 28 U.S.C. § 1915(b)(4). The institution

¹ In addition to the \$350 statutory fee, all parties filing civil actions on or after May 1, 2013, must pay an additional administrative fee of \$50. *See* 28 U.S.C. § 1914(a) (Judicial Conference Schedule of Fees, District Court Misc. Fee Schedule) (eff. May 1, 2013). However, the additional \$50 administrative fee is waived if the plaintiff is granted leave to proceed IFP. *Id.*

1 having custody of the prisoner then collects subsequent payments, assessed at 20% of
 2 the preceding month's income, in any month in which the prisoner's account exceeds
 3 \$10, and forwards those payments to the Court until the entire filing fee is paid. *See* 28
 4 U.S.C. § 1915(b)(2).

5 Plaintiff has submitted a certified copy of his trust account statements pursuant to
 6 28 U.S.C. § 1915(a)(2) and S.D. CAL. CIVLR 3.2. *Andrews*, 398 F.3d at 1119. The
 7 Court has reviewed Plaintiff's statements, as well as the attached prison certificate issued
 8 by an accounting officer at RJD verifying his available balances, and has determined that
 9 Plaintiff has no available funds from which to pay filing fees at this time. *See* 28 U.S.C.
 10 § 1915(b)(4) (providing that "[i]n no event shall a prisoner be prohibited from bringing
 11 a civil action or appealing a civil action or criminal judgment for the reason that the
 12 prisoner has no assets and no means by which to pay the initial partial filing fee.");
 13 *Taylor*, 281 F.3d at 850 (finding that 28 U.S.C. § 1915(b)(4) acts as a "safety-valve"
 14 preventing dismissal of a prisoner's IFP case based solely on a "failure to pay . . . due to
 15 the lack of funds available to him when payment is ordered.").

16 Therefore, the Court **GRANTS** Plaintiff leave to proceed IFP (Doc. No. 2) and
 17 assesses no initial partial filing fee per 28 U.S.C. § 1915(b)(1). However, the entire \$350
 18 balance of the filing fees mandated will be collected and forwarded to the Clerk of the
 19 Court pursuant to the installment payment provisions set out in 28 U.S.C. § 1915(b)(1).

20 **II. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

21 The PLRA also requires that the Court review complaints filed by all persons
 22 proceeding IFP and by those, like Plaintiff, who are "incarcerated or detained in any
 23 facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of
 24 criminal law or the terms or conditions of parole, probation, pretrial release, or
 25 diversionary program," "as soon as practicable after docketing." *See* 28 U.S.C.
 26 §§ 1915(e)(2) and 1915A(b). Under these statutes, the Court must sua sponte dismiss
 27 complaints, or any portions thereof, which are frivolous, malicious, fail to state a claim,
 28 or which seek damages from defendants who are immune. *See* 28 U.S.C.

1 §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000)
 2 (en banc) (§ 1915(e)(2)); *Rhodes v. Robinson*, 621 F.3d 1002, 1004 (9th Cir. 2010)
 3 (discussing 28 U.S.C. § 1915A(b)).

4 “[W]hen determining whether a complaint states a claim, a court must accept as
 5 true all allegations of material fact and must construe those facts in the light most
 6 favorable to the plaintiff.” *Resnick v. Hayes*, 213 F.3d 443, 447 (9th Cir. 2000); *see also*
 7 *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998) (noting that § 1915(e)(2)
 8 “parallels the language of Federal Rule of Civil Procedure 12(b)(6)”). In addition, courts
 9 “have an obligation where the petitioner is pro se, particularly in civil rights cases, to
 10 construe the pleadings liberally and to afford the petitioner the benefit of any doubt.”
 11 *Hebbe v. Pliler*, 627 F.3d 338, 342 & n.7 (9th Cir. 2010) (citing *Bretz v. Kelman*, 773
 12 F.2d 1026, 1027 n.1 (9th Cir. 1985)). The court may not, however, “supply essential
 13 elements of claims that were not initially pled.” *Ivey v. Board of Regents of the*
 14 *University of Alaska*, 673 F.2d 266, 268 (9th Cir. 1982).

15 As currently pleaded, the Court finds the allegations in Plaintiff’s Complaint
 16 sufficient to survive the sua sponte screening required by 28 U.S.C. §§ 1915(e)(2) and
 17 1915A(b).² *See Lopez*, 203 F.3d at 1126-27. Indeed, the Eighth Amendment requires
 18 prison officials to take reasonable measures to guarantee the safety of inmates, and has
 19 been interpreted to include the affirmative duty to protect prisoners. *Farmer v. Brennan*,
 20 511 U.S. 825, 832-33, 837 (1994); *Labatad v. Corrections Corp. of America*, 714 F.3d
 21 1155, 1161 (9th Cir. 2013).

22 Accordingly, the Court finds Plaintiff is entitled to U.S. Marshal service on his
 23 behalf. *See* 28 U.S.C. § 1915(d) (“The officers of the court shall issue and serve all
 24 process, and perform all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(3) (“[T]he court may
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 27 ² Plaintiff is cautioned that “the sua sponte screening and dismissal procedure is
 28 cumulative of, and not a substitute for, any subsequent Rule 12(b)(6) motion that [a
 defendant] may choose to bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D.
 Cal. 2007).

1 order that service be made by a United States marshal or deputy marshal . . . if the
2 plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915.”).

3 **III. CONCLUSION AND ORDER**

4 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

5 1. Plaintiff is **GRANTED** leave to proceed IFP pursuant to 28 U.S.C.
6 § 1915(a) (Doc. No. 2).

7 2. The Secretary of the California Department of Corrections and
8 Rehabilitation, or his designee, must collect from Plaintiff’s prison trust account the
9 \$350 filing fee owed in this case by collecting monthly payments from his account in an
10 amount equal to twenty percent (20%) of the preceding month’s income and forwarding
11 payments to the Clerk of the Court each time the amount in the account exceeds \$10 in
12 accordance with 28 U.S.C. § 1915(b)(2). ALL PAYMENTS SHALL BE CLEARLY
13 IDENTIFIED BY THE NAME AND NUMBER ASSIGNED TO THIS ACTION.

14 3. The Clerk of the Court is directed to serve a copy of this Order on Jeffrey
15 A. Beard, Secretary, California Department of Corrections and Rehabilitation, P.O. Box
16 942883, Sacramento, California, 94283-0001.


17 **IT IS FURTHER ORDERED** that:

18 4. The Clerk is directed to issue a summons as to Plaintiff’s Complaint (Doc.
19 No. 1) upon Defendants and to forward it to Plaintiff along with a blank U.S. Marshal
20 Form 285 for each Defendant. In addition, the Clerk is directed to provide Plaintiff with
21 a certified copy of this Order and a certified copy of his Complaint (Doc. No. 1) and the
22 summons so that he may serve each named Defendant. Upon receipt of this “IFP
23 Package,” Plaintiff is directed to complete the Form 285s as completely and accurately
24 as possible, and to return them to the United States Marshal according to the instructions
25 provided by the Clerk in the letter accompanying his IFP package. Upon receipt, the
26 U.S. Marshal is ORDERED to serve a copy of the Complaint and summons upon each
27 Defendant as directed by Plaintiff on the USM Form 285s. All costs of service will be
28 advanced by the United States. *See* 28 U.S.C. § 1915(d); FED.R.CIV.P. 4(c)(3).

1 5. Defendants are thereafter ORDERED to reply to Plaintiff's Complaint
2 within the time provided by the applicable provisions of Federal Rule of Civil Procedure
3 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while a defendant may occasionally be permitted
4 to "waive the right to reply to any action brought by a prisoner confined in any jail,
5 prison, or other correctional facility under section 1983," once the Court has conducted
6 its sua sponte screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus,
7 has made a preliminary determination based on the face on the pleading alone that
8 Plaintiff has a "reasonable opportunity to prevail on the merits," the defendant is required
9 to respond).

10 6. Plaintiff must serve upon the Defendants or, if appearance has been entered
11 by counsel, upon Defendants' counsel, a copy of every further pleading or other
12 document submitted for consideration of the Court. Plaintiff must include with the
13 original paper to be filed with the Clerk of the Court a certificate stating the manner in
14 which a true and correct copy of any document was served on Defendants, or counsel for
15 Defendants, and the date of service. Any paper received by the Court which has not been
16 filed with the Clerk or which fails to include a Certificate of Service will be disregarded.

17 DATED: August 18, 2014

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19 HON. GONZALO P. CURIEL
20 United States District Judge
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